IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH COURT III

C.P. No. (IB) 356/MB/C-III/2024

Under Section 9 of the Insolvency and Bankruptcy Code, 2016

In the matter of

Xanadu Realty Limited

Having registered office at:
Raheja Platinum, Units 3A 102, 3A 104, 3A 105, and 3A 106, Sag Baug Road, Off Andheri Kurla Road, Marol, Andheri East,
Mumbai 400059.

.....*Operational Creditor/Petitioner*

Versus

T Bhimjyani Realty Private Limited

Having registered office at:
301, A wing, 3rd Floor, Fortune 2000, Bandra Kurla Complex, Bandra East, Mumbai Maharashtra – 400051.

.....*Corporate Debtor/Respondent*

Order pronounced on: 07.08.2025

Coram:
Smt. Lakshmi Gurung, Member (Judicial)
Shri Hariharan Neelakanta Iyer, Member (Technical)

Appearances:

For the Petitioner	Sr. Adv, Mr. Ashish Kamat, Adv. Subhradeep Banerjee, Adv. Avishkar Sawant, Adv. Pankaj Parakh i/b. Mithun Khaire.
For the Respondent	Adv. Nausher Kohli, Adv. Prerak Choudhary, Adv. Trisha Ranka.

Per: Ms. Lakshmi Gurung, Member (Judicial)

1. This Petition has been filed by **Xanadu Realty Limited** (**'Operational Creditor'**) against **T Bhimjyani Realty Private Limited** (**"Corporate Debtor)** to initiate Corporate Insolvency Resolution Process **("CIRP"**) under **Section 9** of the Insolvency and Bankruptcy Code, 2016 (**"the Code"**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Brief Facts as set out in the Petition:

2. The Operational Creditor is a registered real estate agent having registration number A51900000593 under the provisions of RERA, 2016. The Operational Creditor entered into a service agreement dated 21.10.2022 for providing and rendering real estate sales, marketing and project management consultancy services (referred to as **'2022 Agreement')** with the Corporate Debtor. The Corporate Debtor had availed the services of the Operational Creditor for its project Neelkanth Woods (Verraton) registered with MahaRERA bearing registration number PS 1700021698 **('the Project')** as per the Agreement. Subsequently, invoices were generated for the services provided by the Operational Creditor to the Corporate Debtor including the retainer fee and service fee as envisaged in the Agreement.

3. The Operational Creditor had raised 13 (thirteen) invoices on the Corporate Debtor during the period from 16.11.2022 to 26.12.2023 as per details given below:

Sr. No.	**Date**	**Invoice Details**	**Amount in Rs. including taxes**
1.	16.11.2022	22-23/XRL/RF/062	1,08,00,000
2.	22.12.2022	22-23/XRL/SF/224	3,87,377
3.	05.01.2023	22-23/XRL/SF/239	14,85,359
4.	03.02.2023	22-23/XRL/SF/267	29,81,195

5.	03.03.2023	22-23/XRL/SF/296	52,55,969
6.	02.04.2023	23-24/XRL/SF/002	1,10,03,603
7.	03.05.2023	23-24/XRL/SF/050	37,70,651
8.	06.06.2023	23-24/XRL/SF/109	72,31,783
9.	03.07.2023	23-24/XRL/SF/141	1,28,83,317
10.	03.08.2023	23-24/XRL/SF/180	23,36,355
11.	04.09.2023	23-24/XRL/SF/210	41,97,582
12.	05.10.2023	23-24/XRL/SF/260	13,17,310
13.	26.12.2023	23-24/XRL/SF/240	6,70,294
		Total	**6,43,20,795**

4. The invoices dated 16.11.2022, 22.12.2022, 05.01.2023, 03.02.2023, 03.03.2023 (Sr No. 1-5) have been paid in full. However, the balance invoices are either not paid or paid in part. The balance principal amount outstanding as on 22.01.2024 is Rs. **3,73,66,865/-.**

5. As per the invoices and Agreement terms, delayed payments would attract interest charges. Clause 2 and 3 of the remarks section of the invoices states that the payment has to be made within 30 days from the date of invoice, and in the event of any delayed payment, interest would be charged at 1% per month compounded annually. Further, Clause 8.1 under Annexure I of the Agreement envisages the service fee calculated at 5.5% of the net revenue.

6. Clause 4 of the remarks section of the invoices further envisages that in the case of any queries, the same has to be raised within seven working days of receipt, failing which the amount mentioned in the invoice will be deemed accepted by the Corporate Debtor.

7. As per the petitioner, there has been exchange of emails between the Operational creditor and the Corporate debtor in relation to outstanding balance amount, gist of which is set in below:

Date of Email	Particulars
20.05.2023	Email by Operational Creditor calling upon the Corporate Debtor to clear the total outstanding payment of Rs. 1,82,30,223/-.
22.05.2023 24.05.2023	Email from Corporate Debtor to the Operational Creditor to reconcile the outstanding amount and close the account.
06.06.2023	Email from Operational Creditor to the Corporate Debtor providing the reconciled data.
12.07.2023	Email from Operational Creditor to the Corporate Debtor calling upon the Corporate Debtor to clear the outstanding service fee amounting to Rs. 2,88,45,324/- along with accrued interest amounting to Rs. 1,79,621/-.
28.09.2023	Email from the Operational Creditor to the Corporate Debtor calling upon the Corporate Debtor to clear the outstanding service fee amounting to Rs. 3,53,79,260/- along with accrued interest amounting to Rs. 997,663/-
26.10.2023 31.10.2023, 02.11.2023, 07.11.2023, 20.11.2023	Email from the Operational Creditor to the Corporate Debtor enclosing the invoices, and calling upon the Corporate Debtor to clear the outstanding service fee amounting to Rs. 3,66,96,570/- along with interest amounting to Rs.13,60,977 /-.
22.11.2023 28.11.2023 07.12.2023 13.12.2023	Email from the Operational Creditor to the Corporate Debtor enclosing the invoices and calling upon the Corporate Debtor to clear the outstanding service fee amounting to Rs. 3,66,96,570/- along with interest amounting to Rs.17,45,668 /-.

27.12.2023	Email from the Operational Creditor to the Corporate Debtor enclosing the invoices and calling upon the Corporate Debtor to clear the outstanding service fee amounting to Rs. 3,66,96,570/- along with interest amounting to Rs.22,70,628/-.

8. Despite multiple reminders, the Corporate Debtor did not release the outstanding payment. Hence, the Operational Creditor issued a demand notice dated **29.01.2024** under section 8 of the Code, demanding payment of unpaid operational debt of Rs. 4,08,10,505/- within ten days.

9. The Corporate Debtor on 09.02.2024 replied to the demand notice dated 29.01.2024 stating that the Corporate Debtor had raised dispute and pre-arbitration formalities have been initiated which are pending. Thereafter, the Operational Creditor has filed the present Petition.

Submissions of the Corporate Debtor

10. According to the Corporate Debtor, dispute was raised on 11.12.2023, much before the issue of the demand notice dated 29.01.2024 by the Operational Creditor. It was submitted that the CEO of the Corporate Debtor had communicated to the CEO of the Operational Creditor highlighting the problem relating to the services rendered by the operational creditor. To substantiate its submission the corporate debtor has annexed email sent from anshul.bhimjiyani@tbhimjyani.com (CEO of corporate debtor) to the Chief Executive Officer of the operational creditor viz. Mr. Vikas Chaturvedi and Managing Director Mr. Anurag Singhvi on e-mail ids vikas.chaturvedi@xanadu.in and anurag.singhvi@xanadu.in. It was communicated that there was breach of the contract dated 21.10.2022 by the Operational Creditor by sending communication from Sales Team of the Xanadu making some financial commitments including serious commitments of refund on behalf of the Corporate Debtor which were beyond the contract and which are

contradictory to the policy of the Corporate Debtor and are also in violation of RERA guidelines.

11. The Corporate Debtor submitted that in email dated 11.12.2023, it is categorically mentioned that though the Corporate Debtor has received reminders from the Operational Creditor's accounts team to have a meeting to resolve the issue between the Operational Creditor and the Corporate Debtor, the Corporate Debtor had made it clear that such accounts issues are subject to the resolution of issues raised by the Corporate Debtor regarding the objectionable communications made by the Operational Creditor to the customers of the Corporate Debtor.

12. It was submitted that the Corporate Debtor was trying to resolve the dispute in terms of the 'Clause 13.6' of the Agreement, which warranted that the in the event of a dispute, the parties would try and resolve the dispute amicably through consultation by holding meetings at CFO/CEO level which required that if the dispute is not settled within 60 days dispute shall be settled by way of arbitration. Instead of resolving the dispute through consultation, the Operational Creditor has sent the demand Notice dated 29.01.2024, while the cooling period of sixty days was yet to expire for appointment of an arbitrator.

13. It is the case of the Corporate Debtor that while the Dispute Resolution Clause having been invoked by the Corporate Debtor vide communication dated 11.12.2023 and meeting held on 20.12.2023, the Operational Creditor, has sent Notice under Section 8 of the Code, as a tool to undermine 'Clause 13.6' of the contract. The corporate debtor had demanded an undertaking regarding the concerns raised by it. In the said meeting, it was understood that only upon receipt of such undertaking from the Operational Creditor's side, the Corporate Debtor would be in a position to consider the request for the resolution of the outstanding amount after examining the impact and the commercial implication of the e-mails sent by the Operational Creditor to various customers of the

Corporate Debtor. It was explicitly understood in the said meeting that the Operational Creditor would be providing such undertaking(s) and thereafter, a payment schedule would be agreed upon as per reconciled accounts that would be finalised in subsequent meeting(s) if required.

14. It was further submitted that after the said meeting, the Operational Creditor addressed an e-mail on 05.01.2024, through one, Mr. Sharad Harave, which wrongly recorded a purported "next action" to be taken by CEO, of the corporate debtor, to share a draft note for closure on the point of the disputed communication and to provide a payment schedule to the Operational Creditor in respect of accounts.

15. Further aggrieved by such wrong recording of the gist of the meeting dated 20.12.2023, vide e-mail dated 11.01.2024, an e-mail was sent on behalf of the corporate debtor categorically pointing out that until the dispute is satisfactorily addressed by Xanadu it is not appropriate to seek commercial settlement of the matter.

16. It was submitted that the Corporate Debtor having already initiated the necessary steps as required under 'The Dispute Resolution/Arbitration Clause' provided under the Contract i.e. Clause. 13.6 and the pre-arbitration formalities have already been initiated, there is clear existence of a dispute.

Submissions by the Operational Creditor in rejoinder:

17. It was submitted that on 19.10.2018, the Operational Creditor and the Corporate Debtor had entered into a Service Agreement **('2018 Agreement')** under which the Operational Creditor provided real estate services, including sales and marketing-related services to the Corporate Debtor. In addition to the above, the Parties had entered into a Supplemental Agreement dated 23.01.2019, Addendum Agreement dated 05.11.2019 and Amendment Agreement dated 01.09.2020.

18. During the term of the 2018 Agreement, the Corporate Debtor issued cheques that were dishonoured. The Operational Creditor initiated proceedings under Section 138 of the Negotiable Instruments Act of 1881 ("**NI Act**") in the Metropolitan Magistrates Court, Andheri. The dispute under the 2018 Agreement and the 138 Compliant was resolved on 27.09.2022 by entering into a settlement agreement.

19. It was further submitted that the Corporate Debtor has alleged that it has invoked the dispute resolution clause of the service agreement dated 21.10.2022 but the alleged disputed transaction is under the 2018 Agreement and cannot and not under 2022 agreement. Therefore, it cannot be asserted as a pre-existing dispute. Further even assuming there was dispute, the parties have entered into settlement terms under the 2018 Agreement therefore, no dispute remains today.

20. An email addressed to the Operational Creditor by the Corporate Debtor dated 22.05.2023 demonstrates that the emails exchanged between the parties indicate a reconciliation of accounts rather than a dispute over the services rendered. On 06.06.2023, the Operational Creditor emailed the Corporate Debtor, indicating a reconciliation of accounts.

21. Additionally, the Corporate Debtor did not raise any specific objections or disputes regarding the invoices within the seven working days outlined in the Service Agreement (Clause 14.3). This failure to raise timely objections constitutes evidence of acceptance of the debt, thereby negating the claim of a pre-existing dispute.

22. On 02.11.2023, the Corporate Debtor addressed an email to the Operational Creditor requesting correspondence between a customer and the representative of the Operational Creditor for the period between 22.12.2019 and 26.12.2019 regarding the cancellation of a booking unit in the name of Mr. Devendra Gulati. It is pertinent to note that the information requested pertains to the 2018 Service Agreement under which the Operational Creditor had provided services to the Corporate

Debtor. The corporate debtor had issued cheques which were dishonoured resulting into initiation of proceedings under Section 138 of the NI Act which was finally settled by way of settlement agreement dated 27.09.2022.

23. The Operational Creditor submitted that all disputes under 2018 Agreement were settled and the invoices were raised under the Service Agreement dated 21.10.2022, which states that payments must be made within 30 days from the invoice date as per Clause 14.5 of the Service Agreement. The Corporate Debtor's failure to adhere to this payment term constitutes a default, regardless of any alleged disputes raised subsequently.

24. It was submitted that the Corporate Debtor is referring to disputes under a previous Service Agreement dated 19.10.2018 unrelated to the current Service Agreement and the present proceedings. The earlier disputes were resolved through consent terms signed on 27.09.2022 and cannot be invoked to negate the default under the current Service Agreement. Moreover, the Corporate Debtor did not call upon the operational creditor to rectify any alleged defects within the seven working days specified, resulting in deemed acceptance. Therefore, the Corporate Debtor cannot belatedly assert a dispute after a more than six-month lapse.

25. The operational creditor has illustrated the following email communications between the parties:

25.1 **<u>November 2023 - Communications Between the Parties:</u>**

i. The Operational Creditor had sent multiple reminders about the outstanding invoices. These reminders stated the amount due, the due dates, and the interest for the delay as per the contract. More than 16 emails were addressed to the Corporate Debtor to pay the outstanding dues. Surprisingly, the corporate debtor did not raise any dispute regarding this in any of the emails.

ii. On 02.11.2023, the Corporate Debtor emailed the Operational Creditor requesting the details of the correspondence for a unit booked on 19.12.2019. On 05.12.2023, the Operational Creditor representative provided the information to the Corporate Debtor. All the above transactions pertain to the 2018 Agreement, which cannot be raised as a dispute in the 2022 Agreement as the disputes under the 2018 Agreement are settled, and consent terms were filed to that effect.

25.2 **December 2023 - Further Requests for Payment:**

i. On 15.12.2023 the Operational Creditor sent an email to the Corporate Debtor providing email communications between the Corporate Debtor and the Operational Creditor.

ii. Throughout December 2023, the Operational Creditor would have escalated the payment requests, especially if the payments continued to be delayed.

iii. The Corporate Debtor's failure to raise any substantive dispute in these communications demonstrates that the only issue was the Corporate Debtor's financial constraints and not a genuine dispute over the invoices or services rendered.

25.3 **First Mention of a Dispute (Email dated 11.12.2023 and Reply email of 05.01.2024):**

i. It was on 11.12.2023, that the Corporate Debtor raised a query regarding customer refunds or specific unauthorised actions regarding customer refunds for a unit booked on 19.12.2019, which relate to matters under the 2018 Agreement.

ii. The Corporate Debtor did not mention any formal legal dispute but sought clarifications which was already settled by the Consent Terms and has no link to the debt under the 2022 Agreement.

iii. The Operational Creditor stated that it had internally reviewed all relevant records and confirmed that no unauthorised actions or refunds had occurred, apart from the cases already resolved and shared with the Corporate Debtor through official channels. The Operational Creditor made it clear that the payments for the services rendered cannot be withheld on the basis of potential future disputes.

iv. The words in email dated 05.01.2024 the next action does not demonstrate dispute between the parties. The Corporate Debtor had ample time to raise any disputes promptly, and no dispute has been raised concerning the invoices from the 2022 Service Agreement within the prescribed time frame. The attempt to raise a dispute regarding customer refunds or potential claims that may arise in the future appears to be a bogus or speculative defense designed to avoid or delay payment.

v. Therefore, email dated 11.12.2023 cannot be considered a valid dispute since the issues raised seem historical and unrelated to the current operational debt.

25.4 **Email dated 11.01.2024**

i. The email dated 11.01.2024 raised concerns about specific actions or agreements related to customer refunds or forfeitures.

ii. This dispute was raised after several invoices had already become due, and the Operational Creditor issued multiple reminders for payment. The timing of the dispute raised in January 2024 indicates that this is a belated claim, especially compared to the invoices that were due much earlier. The dispute raised in the email dated 11.01.2024 email seems to refer to issues related to customer refunds (dating back to 2019).

iii. The nature of the dispute, i.e., customer refunds or commitments made without proper authorisation, stems from the previous contractual arrangement, the 2018 Agreement. The issue appears to be a historical grievance rather than directly affecting the current debt.

iv. The Consent Terms executed in September 2022 aimed to settle all outstanding disputes under the 2018 Service Agreement, which may have involved issues related to customer refunds, payments, or other similar concerns. These Consent Terms explicitly resolved all matters related to the 2018 Agreement, thus closing any prior disputes.

v. Thus the dispute mentioned in the 11.01.2024 email refers to matters already addressed and resolved, making the email's dispute irrelevant to the 2022 Service Agreement and non-existent as a current dispute.

Analysis and Findings

26. Heard Ld. Sr. Counsel for the Operational Creditor and Ld. counsel for the Corporate Debtor and examined the material placed on record.

27. Considering the submissions of the parties, the question that arises for determination is:

Whether there is a dispute regarding the debt owed to Operational Creditor which would bar the initiation of insolvency proceedings?

28. The Operational Creditor and the Corporate Debtor had earlier entered into a service agreement on 19.10.2018 (**2018 Agreement)**. Upon cheques issued by the Corporate Debtor, being dishonoured, the Operational Creditor initiated criminal proceeding under section 138 of NI Act. Subsequent to these proceedings, Operational Creditor and the Corporate Debtor entered into a **Settlement Agreement dated 27.09.2022** for settling the payment against the dishonoured cheques.

29. Thereafter the parties entered into a fresh contract on 21.10.2022 **(2022 Agreement)** for providing services relating to real estate marketing, sales and project consultancy services. The Operational Creditor had raised 13 (thirteen) invoices on the Corporate Debtor during the period from 16.11.2022 to 26.12.2023. The first five invoices till 03.03.2023 were

paid in full. However, the balance invoices remain outstanding for aggregate amount of Rs. 3,73,66,865/-.

30. Ld. Sr. Counsel for the Operational Creditor submitted that according to the Service Agreement, payments against invoices were due within 30 days from the date of each invoice failing which interest at 12% p.a. would be applicable. The Corporate Debtor has failed to make payment of eight invoices despite numerous reminders, emails, and requests for payment. The corporate debtor neither raised any dispute within the time frame as per the agreement nor released the payment of the invoices. Failure to pay the Operational debt within the stipulated period, constitutes a default under Section 3(12) of the Code.

31. Ld. Sr. Counsel for the Operational Creditor referred to the following clauses of the Annexure I to the Agreement dated 22.10.2022:

8.1 A Service Fee at the rate of 5.5% of the Net Revenue shall be payable by the client to the Service Provider.
It is mutually agreed by the Parties that in case of Cancelled Units, no service Fee would be payable to the Service Provider. However, in case the same flat/unit is sold again, then in such a case the Service Fee shall become applicable and payable by the Client.
Further it is clearly agreed and understood by the Parties that client shall have the right to sell the units to customers referred directly through its employees without engaging any third party. However, the Service Provider shall be entitled for Service fee on such flats/units sold by the client to the employee refereed customers.

*12. **Payment Schedule:** Notwithstanding anything, the Client shall pay the Service Fee to the Service Provider in the following manner:*

(i) 1.0% of the Net Revenue on the receipt of 4.9% of the Agreement Value from the customers;
(ii) 2.0% of the Net Revenue on receipt of a cumulative of 19.8% of the Agreement Value from the Customers and collection of SDR payments and execution of Agreement for Sale; and
(iii) 2.5% of the Net Revenue on receipt of a cumulative of 24.5% of the Agreement Value from the Customers or receipt of first disbursal from the bank/financial institution, whichever is higher.

<u>Clause 14.3</u>
14.3 Client to raise any query/ issue pertaining to the invoice within 7 working days from the receipt of the invoice by client.

32. He has further referred to the Remarks mentioned on the Invoices, relevant portion is extracted below:
(2) Payment to be made within 30 days from the date of Invoice.
(3) In case of delayed payment, interest will be charged at 1% per month compounded annually.
(4) In the case of any queries, kindly raise it within 7 working days of receipt of this invoice on email, failing which it will be deemed to be accepted by you.

33. It was submitted that the Corporate Debtor neither raised any queries on the invoices nor made timely payments despite repeated emails and reminders. Therefore, operational creditor issued Demand Notice dated 29.01.2024 and has complied with the provisions of Section 8 and 9 of the Code providing the Corporate Debtor with a 10-day notice. However, the Corporate Debtor did not settle the outstanding debt or raise any valid dispute within time. Thereafter present petition under section 9 has been filed for default of payment of operational debt of Rs. 3,73,66,865/-

(Principal amount), plus interest amount of Rs. 26,95,177/- and TDS amount of Rs. 7,48,464/- totalling to Rs. 408,10,505/-.

34. Refuting the submissions of the Operational Creditor, Ld. Counsel for the Corporate Debtor submitted that there is pre-existing dispute on the date of issue of the demand notice. The Corporate Debtor, vide its email dated 11.12.2023, has raised dispute and denied its liability to pay unless the problematic issues raised by it are resolved by the Operational Creditor and that the dispute raised much prior to the receipt of the demand notice.

35. In the said e-mail dated 11.12.2023, the Corporate Debtor had sought copies of all such communications made by the Operational Creditor with such customers, to whom correspondences with regard to cancellation and forfeiture were addressed by the Operational Creditor. Further, it was made clear that accounts issues/ remainder invoices could only be gone into pursuant to the resolution of issues raised by the alleged Corporate Debtor regarding the objectionable communications made by the Operational Creditor to the customers of the Corporate Debtor.

36. It was submitted that the Operational Creditor has belatedly addressed a response which did not remotely satisfy the Corporate Debtor's concern i.e. not a single e-mail attached by the Operational Creditor contained a copy of any communication with an actual customer associated with the Corporate Debtor. It was further submitted that there being no acknowledgement of liability by the Corporate Debtor in view of the said email dated 11.12.2023, there existed a genuine dispute, in view of which present petition is not maintainable.

37. Per contra, Ld. Sr. Counsel for the Operational Creditor submitted that a pre-existing dispute must be genuine, timely raised, and must pertain to the claim. Since the dispute raised by the Corporate Debtor concerns a resolved issue of the 2018 Agreement, it cannot be leveraged to postpone payment under the 2022 Agreement.

38. Ld. Sr. Counsel for the Operational Creditor relied upon the case in ***Lata Construction and Others v. Dr Ramesh Chandra Ramniklal Shah and Another (2000) 1 SCC 586*** on the principle of novation and contended that if the terms of two contracts are inconsistent and cannot coexist, the subsequent contract cannot be considered a substitute for the earlier one. It was submitted that once the consent terms are signed and the 2018 Agreement is concluded, the same cannot be asserted in the 2022 Agreement as it was a new agreement and had no connection to the earlier deal.

39. It was further submitted that the Corporate Debtor never raised any objections or disputes regarding the invoices or services under the 2022 Agreement during the period they were due. They failed to comply with the contractual requirement of raising objections within 7 days of receiving the invoice. According to Clause 14.3 of the 2022 Agreement, any dispute or query regarding the invoices must be raised within 7 days of receipt, failing which the invoice is deemed accepted. The Corporate Debtor did not raise any dispute within the required timeframe and there is no record of arbitration or legal action to resolve any dispute.

40. Ld. Counsel for the Corporate Debtor submitted that whether or not the dispute pertains to the year 2018 or under the agreement 2022 agreement is itself a disputed question of fact and triable issue which can only be decided by an arbitrator / Civil Court and further submitted that it has raised more than plausible disputes disputing the services provided by the Operational Creditor which require further investigation and cannot be decided in a summary proceeding under section 9 of the Code.

41. It is to be noticed that the Corporate Debtor had sent email on **11.12.2023** about certain problematic situation due to certain communication sent by Operational Creditor to the customers of the corporate debtor which was contrary to the policy of the corporate debtor

and also not as per RERA guidelines and the Corporate Debtor demanded the copies of all such communications from the operational creditor. It would be relevant to reproduce the said email.

> *"Dear Vikas,*
>
> *As you know, a few weeks ago I spoke with you in detail of a* ***problematic situation*** *I find myself in viz our relationship with Xanadu.*
>
> *It has been brought to our knowledge that sales persons of Xanadu have, on behalf of T Bhimjyani Realty, made certain commitments to customers (potential and actual) of our project The Verraton using the email 10 of Xanadu. Some of these commitments are financial in nature and related to refunds and forfeiture. At the time of hand over, we were given a partial list of customers to who commitments were made by Xanadu for refunds against cancellation. However, we did not receive any copies of correspondence made by Xanadu to these customers confirming such refunds or forfeitures or the responses from the customers.*
>
> *We were recently informed that certain customers have received communication from the sales team of Xanadu at the time of purchase making some commitments of such refunds which are contrary to our policy as on that date and also not as per RERA guidelines. Since such communication was supposed to have been from Xanadu email 10 and we did not have a copy, I have personally requested you to kindly help in getting a copy of all communications sent from Xanadu email IDs on behalf of T Bhimjyani Realty for the Verraton.*
>
> *I have belatedly received the below response. You will see that not a single email attached is a copy of the communication with an actual customer. All emails are between the Xanadu and T Bhimjyani Realty teams. Upon receiving the below, I have tried to get in touch with you as well with Anurag to understand if you even have copies of the communication that Xanadu has entered into on my behalf. I have so far received no response.*

I am receiving constant reminders from your accounts team and from Abhishek to have a meeting to resolve the issue. However, since I have raised the issue at your level directly and have not received the required copies, I felt reasonable to expect a meeting or chat with you directly on how this may be resolved so that I am not put to any financial obligation without my knowledge."

Regards
Anshul

42. The Operational Creditor on 05.01.2024 replied to the Corporate Debtor stating as follows:

"Dear Anshul,

Thanks for taking out time to discuss the ***open issues*** *between Xanadu & T Bhimjyani post the closure of our relationship last September. Just documenting the key takeaways from our discussion on 20th December, 2023:*

1. T Bhimjyani is worried about the commitments made by Xanadu Sales Team on behalf of the project- While Xanadu checked internally through IT and found no such proofs apart from the ones shared in the official refund list to T Bhimjyani, T Bhimjyani recommends that in case any such unknown cases crop up in future with proper evidence being produced, Xanadu takes responsibility for any written commitments made by Sales from Xanadu ID. Next Action: Anshul to share a draft note for closure on this point.

2. T Bhimjyani assured Xanadu that it is making all possible efforts to settle the Overdue amounts of Xanadu and shall endeavour to provide a resolution on the same soon. Anshul acknowledged that there has been a delay and it is his endeavour to clear the dues in this financial year itself. Next Action: Anshul to provide a payment schedule to Xanadu.
PIs add/ modify in case I've missed any point.

Regards,
Sharad.

43. The Corporate Debtor in response sent an email dated 11.01.2024 stating:

"Dear Sharad,

This is an unfortunate misrepresentation of the genuine concerns that have been raised by me that require immediate rectification and a legal and enforceable undertaking to be provided by Xanadu to T Bhimiyani Realty Pvt. Ltd. have also made it clear that until the dispute is satisfactorily addressed by Xanadu it is not appropriate to seek commercial settlement of the matter.

I hope you will look into the matter seriously and address it at the earliest.

Regards
Anshul."

44. The Operational Creditor on 11.01.2024 sent an email to the Corporate Debtor stating as follows:

Dear Anshul,

1. *On the clarification to be provided to address the concerns raised by you, we are awaiting the draft note from your end. Request you to pls mail it to us at the earliest for evaluation.*

2. *You had mentioned that you had tried to payout the dues in October itself but that did not happen due operational delays. You also gave us the comfort that there was no intention of holding the payments and shall address the same as soon as project cashflows support it. Hence asking for the payment schedule.*

Regards,
Sharad

45. From the perusal of above emails, it is clear that before the issue of the Demand Notice dated 29.01.2024 under Section 8 of the Code, the Corporate Debtor vide its email dated 11.12.2023 had raised certain concerns about problematic situation. While replying to the said email of the corporate debtor, the Operational Creditor vide email dated

05.01.2024, had thanked the Corporate Debtor to take out time to discuss open issue and also admitted for sharing of a draft note for closure on this point, indicating that some issue required to be closed between the parties.

46. We further note that the Corporate Debtor vide its email 11.01.2024 has stated that until dispute is satisfactory addressed it shall not initiate commercial settlement.

47. The Operational Creditor has submitted that the dispute raised by the Corporate Debtor is not genuine on account of the following reasons:

    i. The alleged dispute is in relation to the 2018 Agreement which stood resolved by the Consent Terms dated 27.09.2022. The corporate debtor did not raise any objections or disputes concerning the invoices under 2022 Agreement until after the statutory notice was issued.
    ii. The Corporate Debtor raised its claims about customer refunds in November 2023 (well after invoices had become due) and after several reminders for payment.
    iii. As per Section 8(2)(a) of the IBC, the Corporate Debtor must raise any dispute regarding the debt in a timely and substantive manner. Since no factual dispute was raised during the contract period, and only after receiving the demand notice did the Corporate Debtor respond, the dispute cannot be considered genuine.
    iv. The Corporate Debtor failed to settle the dues despite partial payments were made. Several follow-ups with the corporate debtor have not yielded any result. The Corporate Debtor has also withheld TDS payments.

48. The Operational Creditor, in its rejoinder at Para 3.2 (ii) has stated that the alleged dispute is unrelated to the current proceedings. The relevant paragraph is reproduced herein under:

> *"ii. The Operational Creditor categorically denies any suppression of material facts. As already addressed in the paragraphs above, the alleged pre-existing dispute pertains to a different Service Agreement, which was resolved through consent terms signed on 27.09.2022. This earlier dispute is unrelated to the current proceedings based on a subsequent Service Agreement."*

49. We also perused the details relating to the Settlement Agreement dated 27.09.2022. The cheques issued by the corporate debtor had dishonoured leading the Operational Creditor to initiate criminal proceeding under section 138 of Negotiable Instrument Act. Subsequent to the criminal proceedings under NI Act, the corporate debtor entered into a **Settlement Agreement dated 27.09.2022** with the Operational Creditor for settling the payments towards the dishonoured cheques. There is nothing on record to suggest that the disputes raised by the corporate debtor on 11.12.2023, were settled vide Settlement Agreement dated 27.09.2022.

50. Whether or not the dispute raised by the corporate debtor pertains to 2018 Agreement or 2022 agreement and whether the dispute was resolved through Settlement Agreement dated 27.09.2022 or not itself are triable issues which need investigation and detailed trial and this Tribunal having summary jurisdiction under the Code cannot adjudicate on such triable issues.

51. Referring to Clauses 2, 3, 4 of the invoices and clause 14.3 of Annexure to the Agreement, the operational creditor has submitted that after the invoice having become due and payable and the corporate debtor not having raised any dispute within given timeframe under the contract, could not raise dispute and belated act of raising dispute is spurious and illusory. Relevant clauses are given below:

<u>"Clause 2 and 3</u>

(2) Payment to be made within 30 days from the date of Invoice.

(3) In case of delayed payment, interest will be charged at 1% per month compounded annually.

<u>*Clause 4*</u>

(4) In the case of any queries, kindly raise it within 7 working days of receipt of this invoice on email, failing which it will be deemed to be accepted by you.

<u>*Clause 14.3*</u>

14.3 Client to raise any query/ issue pertaining to the invoice within 7 working days from the receipt of the invoice by client."

52. In the same very document of 2022 Agreement, we find clause on dispute resolution which reads as follows:

> *"13.6* ***Dispute Resolution****: It is expressly agreed by the Parties that any and all dispute or differences between the Parties arising out of or in connection herewith or till performance hereunder shall, so far as it is possible, be settled amicably by negotiations between the Parties through consultation and further by appointing a panel consisting of members at the CFO/CEO level respectively and resolve the same immediately. If the dispute is still not settled through consultation within 60 days of the date of such meeting as above between the nominees of the Parties, then the dispute or claim shall be finally settled by arbitration in accordance with the Arbitration and Conciliation Act, 1999 and/or any modifications/amendments thereto. Any dispute or difference submitted to arbitration shall be considered by a sole arbitrator as may be mutually appointed by the Parties and the place of such arbitration shall be Mumbai. The language of arbitration shall be English. Each Party shall bear and pay its own costs and expenses in connection with the arbitration proceedings unless the arbitrators direct otherwise."*

53. Thus, it is undisputed that the 2022 agreement envisages a dispute resolution mechanism, which provides that dispute be settled amicably

by negotiations between the Parties through consultation and further by appointing a panel consisting of CFO/CEO level. If the dispute is still not settled, then the dispute or claim shall be finally settled by arbitration in accordance with the Arbitration and Conciliation Act, 1999.The Corporate Debtor has placed on record communication between the CEO of the Operational Creditor and Corporate Debtor and their efforts for closure of the issue and submitted that they had initiated the dispute resolution process in terms of clause 13.6 of the contract 2022 Agreement by initiating consultation process at CEO level, vide its email dated 11.12.2023.

54. The Operational Creditor has not placed any evidence to show that the parties had settled the issue amicably in terms of clause 13.6 of the contract while the Corporate Debtor has placed on record emails to show consultation at CFO and CEO levels. The Operational Creditor without waiting for 60 days issued demand Notice to the Corporate Debtor under section 8 of the Code which was replied within 10 days pointing out the dispute between the parties raised through emails before issue of demand notice. Therefore, we agree with the submission of the Corporate Debtor that as there is unsolved issue pending between the parties, which amounts to pre-existing dispute.

55. In ***SFO Technologies Pvt Ltd vs Vanu India Private Limited,*** the Hon'ble NCLAT has observed:

> *"39. Be it noted, that the Proceedings under the I & B Code 2016, are summary in character and a trial is not conducted, like that of 'Civil' matter before the 'Competent Civil Court'.*
>
> *40. It cannot be forgotten that an Application under Section 9 of the Code, requires a 'strict proof' of 'Debt and Default'. An existence of a 'Pre-existing Dispute', is a bar to initiation of the 'Corporate Insolvency Process', at the instance of an Operational Creditor'. If there is a 'Preexisting Dispute', between the 'Parties' the main 'CP(IB) No.49/BB/2021',*

under Section 9 of the Code, against the 'Respondent / Corporate Debtor' (filed by the 'Appellant/ Petitioner/ Operational Creditor'), per se is 'not maintainable."

56. Another aspect needs to be noticed. The Corporate Debtor submitted that the accounts of the Operational Creditor and Corporate Debtor were under reconciliation which itself qualifies as a pre-existing dispute. We note that the Operational Creditor had sent an email dated 20.05.2023 to the Corporate Debtor seeking reconciliation which has been admitted by the Operational Creditor in its rejoinder. The said email is set herein under:

"Dear Sir/Madam,

This is to draw your attention that the payment for our Invoices is due as per the details attached.
The total receivable as on date is Rs. 1,82,30,223/- out of which Rs.1,44,59,5721- overdue. The invoice-wise Outstanding Account statement is attached herewith for your reference.
Request you to kindly arrange to make the payment to clear the outstanding amount.
In case you have already made the payment, kindly provide us the payment details to help us to reconcile the payment to your account.
Please feel free to contact us for any queries or clarifications."
Thanks and Regards
Xanadu Realty Limited
Accounts Team

57. The Corporate Debtor, in response, sent an email dated 20.05.2023 stating as follows:

"Dear Xanadu Accounts Team,

We can reconcile the accounts to close the issue.
It may be noted that Mr Tanna and Ms Hema is no more working with Company.
Requested to please not mark email to above ex-employees.
Regards
Dkumaar

58. The Corporate Debtor once again vide its email dated 24.05.2023 had requested the Operational Creditor to reconcile accounts stating as under:

> *"Dear Xanadu Accounts Team*
>
> *Please refer to our trailing email dated 22.05.2023 regarding reconciliation of accounts.*
> *Requested to please depute your representative to reconcile the difference.*
> *Best regards*
> *Dkumaar*

59. The Operational Creditor vide email dated 06.06.2023 replied to the email dated 24.05.2023 stating that they have reconciled the data sent by the Corporate Debtor. The email dated 06.06.2023 is reproduced herein under:

> *"Dear Sir,*
>
> *With reference to your trail mail have reconciled the data provided from your end.*
> ***Have plotted the differences of the cases which we confirm that the same are not eligible for 2nd & 3rd milestone.***
> *However, since the next bill is already due to be raised so the highlighted differences will be taken care.*
> *If any further clarification needed please feel free to connect."*

60. Without commenting whether the reconciliation was achieved or not, suffice to say that above emails are also indicative of reconciliation process and plotting of differences.

61. We also note that the Operational Creditor in the present case has relied on ***Vishal Vijay Kalantri v. DBM Geotechnics and Constructions Private Limited and Another (2021) 17 SCC 820 and Mobilox Innovations Pvt Ltd vs Kirusa Software Pvt Ltd (2017) (2018)1 SCC 353*** to contend that the dispute raised should not be spurious, illusory and hypothetical.

62. The above cases do not aid the case of the Operational Creditor. The adjudicating authority has to ascertain the nature of dispute depending on the facts of each case and segregate the grain from the chaff.

63. In ***M R Logiostics (India) Private Limited Company Appeal (AT) (Insolvency) N0. 667 of 2020*** the Hon'ble NCLAT, after referring to the Supreme Court judgment in *Mobilox Innovations Private Limited v. Kirusa Software Private Limited [2018 (1) SCC 353]* held as follows:

> *"Further the Hon'ble Supreme Court in* ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited [2018 (1) SCC 353]:***
>
> > *"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e. on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be [Section 8(1)].* ***Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [Section 8(2)(a)]. What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. ....."***
> >
> > *"51. ..... Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that-the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence." ....*

22. From the above provision of law, it is clear that the moment there is an existence of dispute, the Corporate Debtor gets out of clutches of the rigour of the Code. Further, the adequacy of dispute is only to be seen where the dispute raised by the Corporate Debtor specify as a dispute as defined under Section 5(6) of IBC. Further, the Hon'ble Supreme Court clearly held:

> *"What is important is that the existence of dispute and/or the suit or arbitration proceedings must be pre-existing i.e., it must exist before the receipt of the Demand Notice or Invoices as the case may be."*

23. *Hence by relying judgment of the Hon'ble Supreme Court and in view of provisions of IBC i.e., 9(5)(ii)(d) of IBC that there is a record of dispute existing between the parties prior to issuance of Demand Notice and prior to filing of Section 9 Application. Hence, the same cannot be either entertained by the Adjudicating Authority or this Tribunal in a Summary Proceeding as held by the Hon'ble Supreme Court.*

64. In ***East India Udyog Ltd vs. SPML Infra Limited ((2023) ibclaw. in 201 NCLAT)*** , the Hon'ble NCLAT held as follows:

> *"12. We also notice that even prior to receipt of demand notice dated 29.07.2020, the Corporate Debtor on 18.07.2020 had refused to accept the outstanding operational debt, inter-alia, on the ground of reconciliation of accounts. We also notice that at page 855 of Appeal Paper Book ('APB' in short), the Operational Creditor in their counter affidavit dated 15.12.2021 to the additional affidavit dated 27.09.2021 filed by the Corporate Debtor has on their own admitted that they had given numerous reminders to the Corporate Debtor prior to 18.07.2020 to reconcile the account. The Adjudicating Authority has also taken note of the fact that since the Appellant had themselves sent email to the Corporate Debtor on 31.08.2018 and 04.09.2019 for reconciliation of accounts, that by itself shows that there existed a dispute between the parties regarding the amount of debt due and the requirement for reconciliation of accounts as both the parties were having counter claims against the other. It is the case of the Appellant that the emails for reconciliation of accounts*

were sent since the Corporate Debtor was not sharing their books of accounts. Be that as it may, this does not detract from the fact that there was a dispute around the debt due and payable since both parties had raised the issue of reconciliation of accounts. We also do not find any material to have been placed on record by the Operational Creditor wherein the Corporate Debtor can be said to have unambiguously admitted the operational debt claimed by the Appellant. We, therefore hold that the Adjudicating Authority has rightly observed in the impugned order that the Corporate Debtor had raised an issue with regard to the existence of amount claimed by the Operational Creditor and asked for reconciliation of account"

65. In recent judgment delivered by Hon'ble NCLAT in ***M/s Morex Corporation Limited vs Jindal Poly Films Ltd. Company Appeal (AT)(Ins) No. 768/2024 dated 24.07.2024,*** it was observed:

"13. When we read Section 9 further, we find that Section 9(5)(ii) envisages that Adjudicating Authority shall reject the Section 9 application, if a notice of dispute has been received by the Operational Creditor or there is record of dispute in the Information Utility. Section 9(5)(ii) is as extracted below:

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under subsection (2), by an order—

(i)….

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been [payment] of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) ***notice of dispute has been received by the operational creditor*** *or there is a record of dispute in the information utility; or*

(e) any disciplinary proceeding is pending against any proposed resolution professional:

(Emphasis Provided)

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days(i) of the date of receipt of such notice from the adjudicating Authority.

14. From a plain reading of the above statutory provisions, it is clear that the existence of dispute and communication of such a dispute to the Operational Creditor is statutorily provided for in Section 8. It is an undisputed fact that in the present matter the Operational Creditor had issued a Demand Notice on 15.05.2020 ***following which the Corporate Debtor had sent a Notice of Dispute on 20.05.2020 highlighting inter alia the dispute surrounding the "illegal and unilateral contract termination".*** *We also notice that the Corporate Debtor did not return the advance payment to the Operational Creditor by contending that the demanded amount was "not payable legally". The Appellant thereafter filed the Section 9 application before the Adjudicating Authority which has been rejected on grounds of pre-existing dispute.*

xxxxxxx

29. *It is an undisputed fact that the Reply to Demand Notice was served upon the Operational Creditor.* ***When we look at the Notice of Dispute, we find that the Corporate Debtor has categorically denied its liability to pay the demanded amount including interest****. The alleged default has also been denied by them and assertion made that the contracted goods had already been manufactured and kept in the warehouse ready for delivery subject to the lifting of the imposition of ban by the Government of India. The Reply Notice also categorically mentions that the closure of contract by the Operational Creditor cannot be treated as termination of the contract as it is a unilateral decision without notice or discussion between the parties. In the absence of this closure of contract being accepted by the Corporate Debtor, it was clearly spelt out in the Notice of*

Dispute that the unilateral termination of contract is illegal and tantamount to a dispute between the parties.

66. Coming to facts of the present case we find the Corporate Debtor had vide letter dated 09.02.2024 replied to the demand notice dated 29.01.2024 giving notice of the dispute already raised by it. The relevant paragraphs from the reply of the corporate debtors are reproduced below:

"2. My client submits that a notice u/s 8 of the Insolvency & Bankruptcy Code does not lie as there is already a dispute pending as on the date of your notice which your client is well aware of. In the pendency of such dispute, no action lies under the provisions of the Insolvency & Bankruptcy Code, 2016) ("IBC").

Xxxx

7. My client, aggrieved by such wrong recording of the gist of the meeting dated 20.12.23, immediately and promptly, within less than a weeks' time, vide e-mail dated 11th January, 2024 at 5.36 pm, responded to the said e-mail categorically inter-alia pointing out that ***"I have made it clear that until the dispute is satisfactorily addressed by Xanadu it is not appropriate to seek commercial settlement of the matter****". My client also pointed out that email dated 5.1.2024 addressed by your client was an unfortunate misrepresentation of the concerns that were raised by my client that requited immediate rectification and a legally enforceable undertaking was to be provided by Xanadu to my client.*

10. In the circumstances, please note that my client is hereby ***notifying you about the existence of a dispute and my client has already initiated the necessary steps as required under The Dispute Resolution/ Arbitration Clause as provided under the Contract i.e. Clause. 13.6 and the pre-arbitration formalities have already been initiated by my client*** *which are pending…."*

67. In reply to the demand notice dated 09.02.2024 the Corporate Debtor had given notice of dispute stating that, Until the dispute was satisfactorily addressed by the Operational Creditor it was not

appropriate to seek commercial settlement. The Corporate Debtor had further clearly stated that all the necessary steps as required under the Dispute Resolution/ Arbitration Clause as provided under the Contract i.e. Clause. 13.6 and the pre-arbitration formalities have already been initiated. On plain reading of the reply to demand notice it is clear that the notice of dispute has been received by the Operational Creditor and condition under Section 9(5)(ii)(d) is met with.

68. The provisions of Code can never be used as recovery proceedings. The Code is the last resort for resolution of insolvency of corporate debtor in case of clearly established debt and default. This Tribunal cannot enter into the field of adjudication of triable issues which need further investigation. It is not for the adjudicating authority under section 9 of the Code to examine the merits of the dispute raised by the corporate debtor and whether the corporate debtor will succeed or not. If the corporate debtor has successfully demonstrated a triable issue surrounding the dispute and notice of dispute was given to the operational creditor in reply to the demand notice, then the adjudicating authority shall reject the application as per section 9(5) (ii)(d) of the Code.

69. As held in ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited [2018 (1) SCC 353]*** in section 9 application, the Adjudicating Authority has to examine whether there is a plausible dispute which requires further investigation and that such dispute is not spurious, hypothetical or illusory argument or an assertion of fact unsupported by evidence. In the present case, it is the admission of the operational creditor that the alleged dispute is under 2018 agreement and not under 2022 agreement, which indicates that the dispute is not patently feeble legal or spurious. As adjudicating authority need not satisfy that the defence is likely to succeed.

70. Conclusion

a. Various communications exchanged between the Operational Creditor and Corporate Debtor as extracted in the foregoing paragraphs, suggest that, efforts were made at CEO/CFO level to resolve the dispute/ differences in accordance with Clause 13.6 of the 2022 Agreement.

b. The Corporate Debtor had raised dispute vide email dated 11.12.2023 prior to issue of demand notice dated 29.01.2024.

c. Notice of dispute has been given to the Operational Creditor in reply dated 09.02.2024 response to Operational Creditor's demand notice dated 29.01.2024 under Section 9 (5) (ii) (d) of the Code.

d. Whether the dispute raised by the Corporate Debtor pertains to the 2018 Agreement or 2022 Agreement itself requires detailed investigation and cannot be adjudicated in summary proceedings under Section 9 of the Code.

71. For all the reasons discussed above, the present Company Petition is **rejected**.

SD/-	**SD/-**
Hariharan Neelakanta Iyer	**Lakshmi Gurung**
Member (Technical)	**Member (Judicial)**
(LRA Apurva)	